No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

On Writ of Certiorari
to The Supreme Court of Minnesota

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Minnesota law makes it a criminal offense for a driver who has been arrested on probable cause for driving while impaired to refuse to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Minnesota Supreme Court, addressing only breath tests, held that the State may criminalize the driver's refusal to submit to a breath test, even without a warrant. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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STATEMENT

Recognizing the terrible toll drunk drivers exact on society, Minnesota enacted its implied consent law in 1961. The purpose of the legislation was two-fold. First, it conditioned the privilege of driving a motor vehicle on a public road on the driver's consent to chemical testing upon arrest. Second, it allowed a suspected drunk driver to withdraw consent, but imposed administrative license sanctions for refusing to test. 1961 Minn. Laws 713. One of the rationales for penalizing test refusal was to prevent the violent confrontations associated with forced blood draws.

Later, many states, including Minnesota, enacted *per se* drunk driving laws under which prosecutors no longer had to prove actual impairment, but could rely instead on a presumption of intoxication at a certain blood alcohol content (BAC) level. Minnesota passed such a law in 1971, which defined a BAC of 0.10% to be illegal *per se*. 1971 Minn. Laws 1811. Five years later, Minnesota was the first state to impose administrative license sanctions for those drunk drivers who were found to have a BAC of 0.10% or higher. 1976 Minn. Laws 1357. By 2004, Minnesota, along with all other 50 states, lowered the *per se* BAC level to 0.08%. 2004 Minn. Laws 1244.

The State could effectively enforce its *per se* statutes only by regularly determining drunk drivers' BAC. The State therefore had to encourage drivers suspected of drunk driving to submit to chemical testing. Towards that end, Minnesota made it illegal for repeat offenders suspected of drunk driving to refuse to submit to chemical testing. 1989 Minn. Laws 1658. Effective January 1, 1993, the Minnesota Legislature expanded the law and made test refusal a

crime for *any* suspected drunk driver who refused chemical testing. 1992 Minn. Laws 1947.

Minnesota's test refusal statute has proven to be an effective tool. The initial version of the law, applicable only to repeat offenders, lowered the State's refusal rate from 24.3% in 1988 to 22.4% in 1991. H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71-72 (1995). When the State expanded the law to all suspected drunk drivers, the impact was far more dramatic — Minnesota experienced a 50% reduction in its refusal rate. *Id.* This trend has continued. According to the National Highway Traffic Safety Administration, in 2011, the national average BAC test refusal rate (based on data from thirty-four states) was 24% — Minnesota's refusal rate was 12%. Ester Namuswe, et al., *Breath Test Refusal Rates in the United States – 2011 Update*, (March 2014). It is this effective tool that is the subject of this appeal.

A. Statement of Facts.

The underlying facts of this case are undisputed. On August 5, 2012, in Dakota County, Minnesota, police officers received a report of three intoxicated males attempting to extract a boat out of the water with a truck. At approximately 7:00 p.m., officers were dispatched to a Department of Natural Resources boat launch to investigate; they were told that the truck had become stuck in the process.

Upon their arrival, a witness directed them to three men who appeared to be drunk, situated near a truck stuck on the edge of the boat launch. The officers went up to them and smelled alcohol. The men all denied driving the truck, but two witnesses identified the driver of the truck as the man wearing

solely his underwear, who was later identified as Petitioner William Bernard. A witness also advised officers that Petitioner was stumbling as he walked from the boat to the truck.

The officers walked up to Petitioner and smelled a strong odor of alcohol on his breath and saw that his eyes were bloodshot and watery. Petitioner admitted to drinking alcohol but denied driving the truck even though the officers located the keys to the vehicle in his hand. The officers asked Petitioner to perform field sobriety tests but he refused. At that point, they arrested Petitioner and transported him to the South St. Paul Police Department where he was read the Minnesota Implied Consent Advisory. They then asked Petitioner to take a breath test; he refused stating, "I have no reason to take one."

Because Petitioner had a prior felony impaired driving conviction, the State charged him with two counts of First-Degree Driving While Impaired—Test Refusal in violation of Minn. Stat. §§ 169A.20, subd. 2; subd. 1(1)-(2) and 169A.276, subd. 1(a).

B. The decisions below.

The Dakota County District Court held that the officer had probable cause to arrest Petitioner, but ruled that the State's implied consent law violated the Fourth Amendment. Pet. App. 47a-61a. The Minnesota Court of Appeals reversed, holding that it was "constitutionally reasonable" for an officer to "giv[e] Bernard the choice to voluntarily submit to warrantless testing" when the officer, based on probable cause, could have obtained a search warrant. Pet. App. 43a.

The Minnesota Supreme Court affirmed on different grounds. Pet. App. 1a-22a. The court

concluded that "charging [Petitioner] with criminal test refusal does not implicate a fundamental right" because the officers "could have conducted a warrantless search of [Petitioner's] breath as a search incident to a valid arrest." Pet. App. 3a, 7a. The court explained that *United States v. Robinson*, 414 U.S. 218, 235 (1973), held that "the police are authorized to conduct a 'full search of the person' who has been lawfully arrested," and that both its decisions and those of other courts around the nation have "allowed searches of the body beyond a pat down." Pet. App. 8a; *see also id.* at 8a-9a & n.6 (citing cases).

After pointing to several other courts that have upheld breath tests as searches incident to arrest, the Minnesota Supreme Court stated that its "research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." Pet. App. 10a. The court rejected Petitioner's contention that *Arizona v. Gant*, 556 U.S. 332 (2009), and *Riley v. California*, 134 S. Ct. 2473 (2014), "retract[ed] the scope of searches" of the person authorized by *Robinson*'s categorical rule. Pet. App. 11a-17a. The Court explained that *Gant* "did not address a search of a person," *id.* at 11a; and *Riley* "reaffirmed *Robinson*'s holding that 'searches of a person' are lawful as part of a search incident to arrest without any additional showing by the government." *Id.* at 15a n.8 (quoting *Riley*, 134 S. Ct. at 2485).

SUMMARY OF ARGUMENT

The Fourth Amendment provides that persons have the right to be secure in their persons against unreasonable searches and seizures. The Fourth Amendment is applicable to the collection of breath, urine or blood from a person lawfully arrested for driving while impaired; however, that only begins the inquiry into the standards governing such intrusions. While a warrantless search is generally unreasonable, this Court has recognized several exceptions to the warrant requirement. One of those well-recognized exceptions is a search incident to lawful arrest as articulated by this Court in *Robinson*. In *Robinson*, this Court created a categorical rule holding that police officers are authorized to conduct a full search of a person who has been lawfully arrested. The Minnesota Supreme Court correctly applied the bright-line rule of *Robinson* and held that a warrantless breath test of a suspect lawfully arrested for driving while impaired does not violate the Fourth Amendment because it is a search incident to arrest. Accordingly, because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test.

Alternatively, a warrantless breath test is permissible because it satisfies the general reasonableness requirement of the Fourth Amendment. The Fourth Amendment is not a guarantee against all searches and seizures – only unreasonable ones. The application of traditional standards of reasonableness requires this Court to weigh the promotion of legitimate governmental

interests against the degree to which the search intrudes upon an individual's privacy.

This Court has long recognized the government's interest in protecting lives and securing the safety of its public roads by prosecuting drivers who elect to drive drunk. In comparison, a person who chooses to drive drunk has diminished expectations of privacy because the person is participating in the highly regulated activity of operating a motor vehicle on a public road. If arrested, the person's expectation of privacy is further diminished by being in police custody. As to the breath test itself, it is minimally intrusive and its administration does not implicate significant privacy concerns because a breath test reveals no other facts except the level of alcohol in the person's bloodstream.

The government's compelling interest in eradicating drunk driving far outweighs the small intrusion on drunk drivers' privacy. A warrantless breath test is therefore reasonable under the Fourth Amendment. And because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test.

ARGUMENT

This Court has long recognized that States have a legitimate interest in eradicating drunk driving to protect lives and secure the safety of public roads. One of the tools the Court has endorsed in this effort is implied-consent and test-refusal laws that (1) condition driving on state roads on a person's consent to submit to a chemical test if he is arrested on suspicion of drunk driving, and (2) impose significant consequences for revoking that consent. Some states, such as Minnesota and North Dakota, impose criminal sanctions if a person withdraws his consent. Petitioner asserts that Minnesota's implied consent statute violates his Fourth Amendment right to refuse a warrantless search. His argument fails for the reasons articulated by the State of North Dakota in its brief on the merits in *Birchfield*.

His argument also fails for reasons distinct to this case. Whereas *Birchfield* involves refusal to submit to a *blood* test, this case involves refusal to submit to the less-intrusive *breath* test. Warrantless breath tests are permissible under the Fourth Amendment for two independent reasons: under the search incident to arrest doctrine and because, in this context, they satisfy the general reasonableness requirements of the Fourth Amendment. That resolves this case. As Petitioner does not appear to dispute, if the State may compel a person to submit to a warrantless breath test, it has the associated power to impose a criminal sanction for refusing to take the test.

A. Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving would be permissible pursuant to the search incident to arrest doctrine.

The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that persons have the right to be secure in their persons, houses, papers and effects, against "unreasonable searches and seizures." The ultimate touchstone of the Fourth Amendment, therefore, is reasonableness. *See Maryland v. King*, 133 S.Ct. 1958, 1968 (2013) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)).

A warrantless search is generally unreasonable unless it falls into one of the recognized exceptions to the warrant requirement. *Gant*, 556 U.S. at 338 (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). One of those well-recognized exceptions is a search incident to a lawful arrest. *Gant*, 556 U.S. at 338 (citation omitted). This exception dates back to the founding, when "[a]nyone arrested could expect that not only his surface clothing, but his body, luggage, and saddlebags would be searched and, perhaps, his shoes, socks, and mouth as well." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, at 420, 751 (2009).

The modern day groundwork for the search incident to arrest doctrine was fashioned by this Court in *Chimel v. California*, 395 U.S. 752 (1969). Under *Chimel*, police may search incident to arrest

the area within an arrestee's "immediate control," meaning "the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763. The Court justified the exception on two grounds: officer safety and to prevent the "concealment or destruction of evidence." *Id.*

Four years later, in *United States v. Robinson*, 414 U.S. 218 (1973), the Court adopted the bright-line rule that police officers may, without a warrant, always conduct a full search of a person who has been lawfully arrested. *Id.* at 235. The Court specifically rejected the proposition that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Id.* Instead, the Court concluded that the arrest of a person based on probable cause is a "reasonable intrusion under the Fourth Amendment" and that "a search incident to arrest requires no additional justification." Accordingly, the arresting officer need not have a specific concern about the loss of evidence or that the person might be armed. *Id.*

In this case, the Minnesota Supreme Court relied on the categorical rule articulated in *Robinson* and held that a warrantless breath test of a suspect lawfully arrested for driving while impaired does not violate the Fourth Amendment because it is a search incident to lawful arrest. Pet. App. 8a-9a. Thus, reasoned the court, because a police officer could compel a suspect to submit to a breath test, it does not violate the Fourth Amendment to criminally charge the suspect for refusing to take the test. That decision faithfully applied this Court's Fourth Amendment jurisprudence. Petitioner levies several objections to the Minnesota court's holding, but none has merit.

First, Petitioner contends (Pet'r Br. 15-20) that this Court effectively overruled *Robinson* in *Arizona v. Gant*, 556 U.S. 332 (2009), and *Riley v. California*, 134 S. Ct. 2473 (2014). It did no such thing. *Gant* sought to resolve confusion stemming from *Chimel*'s holding that a search incident to arrest may include not only a search of the person, but also of "the area 'within his immediate control'." *Chimel*, 395 U.S. at 763. In *New York v. Belton*, 453 U.S. 454, 460 (1981), the Court granted certiorari because "courts ha[d] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile." *Gant* simply revisited that question. Its holding did not purport to address searches *of the person*; and it certainly did not call into question the longstanding categorical right to search persons incident to lawful arrests.

Indeed, in *McNeely* — decided several years after *Gant* — this Court reiterated the categorical nature of the *Robinson* rule when differentiating the exigent circumstances exception from the search incident to arrest rule. The Court explained that it has "recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception . . are implicated in a particular case" — and cited *Robinson* as one example. *Missouri v. McNeely*, 133 S.Ct. 1552, 1559 n.3 (2013) (citing *Robinson*, 414 U.S. at 224-35); *see also King*, 133 S.Ct. at 1970-71 (describing categorical nature of search incident to arrest rule).

Nor did *Riley v. California* cast doubt on officers' categorical right to search the person upon a lawful arrest. The Court did not question the *per se*

rule adopted in *Robinson* allowing "searches of a person" and even searches of "physical objects" found on persons. *Riley*, 134 S.Ct. at 2483-85. Rather, the Court simply "decline[d] to *extend Robinson* to searches of data on cell phones," which "bear[] little resemblance to the type of brief physical search considered in *Robinson*." *Id.* at 2485 (emphasis added). And that was because "[c]ell phones differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 2478. As described in § B(2), *infra*, that concern has no application with respect to breath tests.

Second, Petitioner contends (seemingly in the alternative) that the Court should carve out breath tests from the categorical *Robinson* rule because "it is a category of searches that can have no connection to the *Chimel* justifications." Pet'r Br. 21. That request contradicts the *per se* nature of the *Robinson* rule, whose underlying premise was that an arrest based upon probable cause "being lawful, a search incident to arrest requires no additional justification." *Robinson*, 414 U.S. at 235. Category-of-evidence by category-of-evidence adjudication is no more consistent with that principle than the "case-by-case adjudication" *Robinson* expressly rejected. *Id.*

On top of that, Petitioner's premise is wrong: breath tests plainly further the *Chimel* justification in preventing the destruction of evidence. Although *McNeely* held that the dissipation of alcohol in the blood is not so rapid as to *always* implicate the exigency exception, the Court did not dispute that "as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated."

McNeely, 133 S.Ct. at 1560. For that reason, "a significant delay in testing will negatively affect the probative value of the results." *Id.* at 1561. The contention that breath tests do not further the search-incident-to-arrest objective of preventing the destruction of evidence cannot be credited.

Third, Petitioner argues that *McNeely* and *Schmerber v. California*, 384 U.S. 757 (1966), already established that breath tests are not properly part of a search incident to arrest. Pet'r Br. 15 (asserting that applying search incident to arrest doctrine here would "read[] this Court's *McNeely* decision off the books"); 19 (quoting *Schmerber*). But, of course, both of those decisions involved blood tests, not breath tests. Once again, Petitioner is relying on cases that did not address the issue presented here.

Fourth and relatedly, Petitioner maintains that "there is no constitutional distinction between warrantless breath and blood tests." Pet'r Br. 23. To the contrary, the Minnesota Supreme Court quite sensibly drew a line between those two types of tests, holding that only the former may be given under the search incident to arrest doctrine. Pet. App. 10a-11a n.6. This Court explained in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 625 (1989), that "[u]nlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment."

Although this Court has never faced the issue, courts around the nation have never understood the search incident to arrest doctrine as excluding obtaining biological evidence from the body. Courts have upheld testing arrestees' hands for gunpowder residue, *see United States v. Johnson*, 445 F.3d 793, 795-96 (5th Cir. 2006); *Jones v. State*, 74 A.2d 802,

812-13 (Md. Ct. Spec. App. 2013); obtaining strands of arrestees' hair, *see United States v. D'Amico*, 408 F.2d 331, 332-33 (2d Cir. 1969); and searching an arrestee's mouth for narcotics, *see Espinoza v. United States*, 278 F.2d 802, 804 (5th Cir. 1960). Further, in *Cupp v. Murphy*, 412 U.S. 291, 295 (1973), a pre-*Robinson* opinion, this Court held that scraping a defendant's fingernails for evidence was constitutionally permissible under the search incident to arrest doctrine.

All told, requiring a person lawfully arrested on suspicion of drunk driving to breathe into a breathalyzer falls comfortably within the search incident to arrest doctrine. For that reason, Minnesota's test refusal statute is constitutional as applied to breath tests.

B. Alternatively, Minnesota's test refusal statute is constitutional as applied to breath tests because a warrantless breath test administered to a suspect lawfully arrested for drunk driving satisfies the general reasonableness requirement of the Fourth Amendment.

The proper function of the Fourth Amendment is not to constrain all intrusions, but only those "'which are not justified in the circumstances, or which are made in an improper manner.'" *King*, 133 S.Ct. at 1969 (quoting *Schmerber*, 384 U.S. at 768). Thus, the Fourth Amendment is not a guarantee against all searches and seizures — only those that are unreasonable. And as to certain categories of warrantless searches, "'rather than employing a *per se* rule of unreasonableness, [this Court] balance[s]

the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.'" *Id.* at 1970 (quoting *Illinois v. McArthur*, 531 U.S. 326, 331 (2001)).

The Court most recently conducted that analysis in *Maryland v. King* and *Samson v. California*, 547 U.S. 843, 848 (2006). In *Samson*, the Court explained that, to determine whether a search is reasonable, the Court balances the interests at stake by examining the "totality of the circumstances." 547 U.S. at 848 (citing *United States v. Knights*, 534 U.S. 112, 118 (2001)). Whether a search is reasonable "requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *King*, 133 S. Ct. at 1970 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Here, as in *King* and *Samson*, the governmental interest significantly outweighs the minimal privacy intrusion of blowing into a breath-testing instrument for the small category of individuals who are arrested on probable cause for driving while impaired, having driven on Minnesota roads subject to the condition that they consent to a chemical test should they ever be arrested for drunk driving.

1. Combating Drunk Driving is a Significant Governmental Interest that Implied-Consent and Test-Refusal Laws Effectively Address.

It is undisputed that States have a paramount interest in eradicating drunk driving to protect lives and secure the safety of public roads. According to the National Highway Traffic Safety Administration

(NHTSA), in 2012, more than 10,000 people died in alcohol-impaired driving crashes — one person every 51 minutes. NHTSA also estimates that alcohol-impaired motor vehicle crashes cost an estimated $37 billion per year. NHTSA, http://www.nhtsa.gov/Impaired.

This Court has long recognized the costs of drunk driving as a substantial and compelling governmental interest. Starting as early as 1957, when addressing the constitutionality of a blood draw from an unconscious drunk driver who was responsible for the deaths of three people, the Court noted "[t]he increasing slaughter on our highways" caused by drunk drivers and that the deaths caused by drunk drivers had reached "astounding figures only heard of on the battlefield." *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). In *Breithaupt*, this Court also recognized the importance of the government's efforts "through safety measures, modern scientific methods, and strict enforcement of traffic laws" to combat drunk driving. *Id.*

In subsequent cases, this Court continued to recognize drunk driving as a significant public safety risk and that States have a compelling interest in eradicating that risk from its public roads. The Court recently reiterated this in *McNeely*, noting the "terrible toll" drunk driving exacts on our society. *McNeely*, 133 S.Ct. at 1565. *See also Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it"); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) ("The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed

recitation here"); *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (recognizing the "compelling interest in highway safety"); *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars").

Minnesota's implied consent law, including its criminalization of test refusal, is one of many effective tools the State uses to deter drivers from driving under the influence and to encourage them to submit to testing if lawfully arrested for doing so. One study concluded that alcohol concentration test refusals compromise the enforcement of drunk-driving laws. Pet. App. 21a (citing Ralph K. Jones & James L. Nichols, *Breath Test Refusals and Their Effect on DWI Prosecution* 42 (2012) (concluding that "[a]s statewide refusal rates increased, overall conviction rates . . . decreased")). Another study found that "Minnesota's test refusal statute has led to a lower refusal rate and an increased conviction rate for alcohol-related offenses, including driving under the influence and test refusal." Pet. App. 21a-22a (citing H.L. Ross, et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 Alcohol, Drugs and Driving 57, 71-72 (1995)). Still another study noted that the United States has been "left with a relatively weak procedure for requiring DUI suspects to participate in a BAC test compared to the rest of the industrialized world where most countries have criminalized test refusal." Robert Voas et al., *Implied Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, J Safety Res; 40(2): 77-83 (2009). Dr. Voas noted that the "refusal problem is growing and that it seriously interferes with the prosecution of DUI offenders." *Id.*

Similarly, as discussed *supra*, this Court in *McNeely* endorsed the use of implied consent laws — just as it has done many times before. *McNeely* explained that its holding does not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses" because "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566. "For example," stated the Court, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked[.]" *Id.* (internal citations omitted). Likewise, in addressing an administrative penalty under Massachusetts' implied consent law for refusing to take a breath test, this Court in *Mackey* recognized that the penalty substantially served the governmental interest because it serves as a deterrent to drunk driving, provides an inducement to take a breath test, and removes licensed drivers from the road who are arrested for drunk driving and refuse to take the test. *Mackey*, 443 U.S. at 2.

Test refusal statutes also prevent the type of violent confrontation that occurred in *McNeely* [1] In

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[1] There is a significant factual difference between this case and what occurred in *McNeely*. The search in *McNeely* was substantially more intrusive having involved the forcible taking of a blood sample against the defendant's will. In contrast, this case involved Petitioner's voluntary refusal to take a minimally intrusive breath test after being advised of his rights under the implied consent law. Petitioner's refusal to take a breath test

Neville, this Court recognized that a penalty for test refusal serves the important governmental interest of avoiding "violent confrontations" associated with blood alcohol draws. *Neville*, 459 U.S. at 559. Minnesota has long recognized this as a significant governmental interest, having enacted its implied consent law in 1961 for that very reason. 1961 Minn. Laws 713. The purpose of the statute was two-fold: (1) it provided that consent to chemical testing is implied by driving a motor vehicle; and (2) it allowed a person to withdraw consent, but imposed license sanctions for test refusal.

As a practical matter, it is impossible to administer a breath or urine test without a suspect's cooperation. Consequently, if a suspect refuses a breath test — as he is more likely to do if the statutory sanctions are lifted — police officers would be required to obtain search warrants for forced blood draws, which are significantly more intrusive in nature than breath tests and create a public safety risk. *See State v. Wiseman*, 816 N.W.2d 689, 696 (Minn. Ct. App. 2012), *review denied* (Minn. Sept. 25, 2012), *cert. denied* 133 S. Ct. 1585 (2013), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (finding that forcible blood draws are a public safety risk because they can result "in injury to a police officer, medical personnel or [the defendant]"). Such a regime would undermine what this Court encouraged in *McNeely* — the use of implied consent laws to prevent the violent confrontations associated with forced blood draws.

Finally, the implied consent law is carefully tailored to meet the government's interest in

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was honored and no testing of any kind was conducted. Instead, Petitioner was criminally charged under the refusal statute.

combating drunk driving. The law only allows a police officer to request a breath test from a suspect after the officer has probable cause to believe the suspect is driving while impaired. Accordingly, the law applies only to a very narrow subset of drivers on the road — a subset that the government has a great interest in obtaining a breath test from because it has good reason to believe they are driving drunk. In this, the statute compares favorably (in terms of both being more limited as to whom it applies and in terms of being more critical to a government interest) to the programs upheld in *Von Raab* and *Skinner*, which involved chemical testing without that level of individual suspicion. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602.

2. Implied-Consent and Test-Refusal Laws Only Minimally Intrude on Privacy Interests.

In contrast to the substantial governmental interest in prosecuting individuals who choose to drive while impaired, a breath test's intrusion on the privacy of a person arrested on probable cause for drunk driving is minor.

First, a breath test is minimally intrusive. "The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term." *King*, 133 S.Ct. at 1969 (finding that a buccal swab is minimally intrusive in comparison to drawing blood because it requires no surgical intrusions beneath the skin). And as noted in § (A), *supra*, this Court in *Skinner* specifically found that the administration of a breath test is less intrusive than a blood test. *Skinner*, 489 U.S. at 625 ("Unlike blood tests, breath

tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment").

The breath test instrument used throughout Minnesota is the Datamaster DMT-G ("DMT"). David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety (Sept. 8, 2015). How a breath test result is to be obtained is carefully spelled out in the state's implied consent law. For a DMT, the test consists of one adequate breath sample, one calibration standard analysis, and a second adequate breath sample analysis. Minn. Stat. § 169A.51, subd. 5(a) (2014). The suspect has up to three minutes per sample to provide an adequate breath sample. Eden et al., *supra*. The breath test itself simply requires the suspect to blow into a straw-like mouthpiece attached to the end of a tube that is connected to the DMT. *Id.* Obtaining an adequate sample generally only requires the suspect to continuously blow into the mouthpiece anywhere from four to fifteen seconds.[2]

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[2] Blowing into a DMT is no different than blowing into an ignition interlock device. In Minnesota, certain alcohol offenders have the option of regaining their driving privileges by participating in the Minnesota Ignition Interlock Device Program. Minn. Stat. § 171.306, subd. 3. The device is equipped with a camera and installed near the steering wheel and connected to the vehicle's engine. The driver is required to blow into the device to determine the driver's alcohol concentration. A photo is taken at the same time. If alcohol is detected, the vehicle will not start and the Minnesota Department of Vehicle Services is notified of the violation. Minnesota Department of Public Safety, *Minnesota Ignition Interlock Device Program – Program Guidelines* (July 2015), https://dps.mn.gov/divisions/dvs/programs/mn-ignition-interlock/Documents/Ignition-Interlock-ProgramGuidelines.pdf

See, e.g., Giannopoulos v. Dep't of Transp., Bureau of Driver Licensing, 82 A.3d 1092 (Pa. Commw. Ct. 2013); *Mullins v. State*, 646 N.E.2d 40 (1995).

Second, the administration of a breath test does not implicate significant privacy concerns because unlike a blood draw or a buccal swab for DNA, breath tests "reveal the level of alcohol in [a person's] bloodstream and nothing more." *Skinner*, 489 U.S. at 625. Breath tests reveal no other facts in which the suspect has a substantial privacy interest. *Id.* at 626 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy"); *United States v. Place*, 462 U.S. 696, 707 (1983) (the "limited disclosure" of a dog sniff that detects only contraband "ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods").

Third, a driver's expectation of privacy is diminished because the driver is on notice of potential police intrusion when taking part in the highly regulated activity of operating a motor vehicle on a public roadway. All States require motor vehicles to be registered and drivers to be licensed. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). All States have enacted extensive and detailed traffic codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways. *Id.* Drivers are well aware that police stops of vehicles are an everyday occurrence. *California v. Carney*, 471 U.S. 386, 392 (1985) (citing *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

Fourth, the only individuals whose privacy is at issue have already been arrested for driving while impaired — and as this Court has explained, "[t]he expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.'" *King*, 133 S.Ct. at 1978 (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)). By definition, an arrestee "do[es] not enjoy 'the absolute liberty to which every citizen is entitled.'" *Knights*, 534 U.S. at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). "An arrest is the initial stage of a criminal prosecution" and is "inevitably accompanied by future interference with the individual's freedom of movement." *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

An arrestee is also subject to other serious restrictions and intrusions. Both the arrestee's person and the property in his immediate possession may be searched at the jail. *United States v. Edwards*, 415 U.S. 800, 803 (1974). A search of the arrestee's person may involve a relatively extensive exploration, including requiring the arrestee to lift his genitals or cough in a squatting position. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S.Ct. 1510, 1520 (2012). The arrestee is subject to booking procedures, including photographing and fingerprinting and, in some states, DNA testing. *King*, 133 S.Ct. 1958. An arrestee may be confined in jail pending appearance before a judicial officer. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). If charged, the arrestee may be subject to further restrictions, including continued detention or release from jail upon bail and/or conditions or release.

Furthermore, before deciding whether to submit to chemical testing, the suspect has the right to first consult with an attorney. Minn. Stat. §

169A.51, subd. 2(a)(4) (2014). The suspect has the opportunity to discuss the facts of his case with his attorney and seek advice as to whether to submit to chemical testing.

On top of all that, a neutral magistrate will review the officer's probable cause determination before any criminal penalty is imposed. If police officers make contact without reason, fail to articulate sufficient probable cause for the arrest, or fail to vindicate the suspect's right to counsel prior to reading the implied consent advisory, the suspect may challenge the refusal charge at an evidentiary hearing before a magistrate. If the State is unable to meet its burden, the magistrate will dismiss the refusal charge as well as any associated drunk driving charges. Petitioner's concern that the State's laws cast neutral magistrates out of the picture is therefore misplaced.

Finally, under Minnesota's implied consent law, the circumstances justifying alcohol testing are narrowly defined. There are virtually no facts for a magistrate to evaluate in a standard drunk driving case where the driver exhibits illegal or suspicious driving conduct and displays signs of impairment during the interaction. As in *Skinner*, obtaining thousands of "boiler-plate" search warrants in routine driving while impaired cases in place of the implied consent law would add little to the assurances of regularity already afforded by the statutes. It would, however, frustrate achieving the State's compelling interest in enforcing drunk driving laws to keep the driving public safe. *Skinner*, 489 U.S. at 623-24.

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In the end, given the diminished expectation of privacy of persons driving while impaired *and* of persons arrested, and the minimal invasiveness of a

breath test, the outcome of weighing is plain: the government's compelling interest in eradicating drunk driving far outweighs the small intrusion on drunk drivers' privacy. A warrantless breath test is therefore reasonable under the Fourth Amendment. And (once again) because a police officer could compel a suspect to submit to a breath test, the State may criminally charge the suspect for refusing to take that test.

C. Minnesota's refusal statute does not violate the doctrine of unconstitutional conditions.

Petitioner argued to the Minnesota Supreme Court that Minnesota's refusal statute violates the unconstitutional conditions doctrine because it compels a person to relinquish his Fourth Amendment right to be free from an unreasonable search and seizure as a condition of maintaining his driving privileges. To avoid repetition, with respect to Petitioner's unconstitutional conditions argument, the State of Minnesota relies upon the arguments made by the State of North Dakota in its brief on the merits in *Birchfield*.

CONCLUSION

The decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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